CHONG FOOK FATT

v.

PP

HIGH COURT SABAH & SARAWAK, KUCHING
LAU BEE LAN JC
[CRIMINAL APPEAL NO: 41-06-2003-III(II)]
3 NOVEMBER 2003

CRIMINAL PROCEDURE: *Prosecution - Conduct of prosecution - Whether unfettered discretion of Attorney General as Public Prosecutor - Application for discharge not amounting to acquittal when prosecution ready to proceed with hearing - Whether inappropriate - Federal Constitution art. 145 - Penal Code s. 379A - Criminal Procedure Code s. 173(c), (g)*

The appellant was charged with the theft of a motorcar under s. 379A Penal Code. While the charge was pending, the appellant wrote to the police asking them to trace one 'Ah Lee' whom the appellant alleged had requested him to respray the motorcar. Subsequently, the police replied that they have tried, *albeit* unsuccessfully, to trace Ah Lee but that investigations would be continued. The appellant took such correspondence as indicating that the police have not completed their investigations into his case, and in the circumstances, at the trial below, applied to the learned magistrate for an order of discharge not amounting to an acquittal ('DNAA') under s. 173(g) of the Criminal Procedure Code ('CPC'). The application was however refused on the grounds *inter alia* that it was premature of the court to have decided that the charge was groundless and further that the prosecution, having indicated their readiness to proceed, ought to be allowed to proceed with the case. Dissatisfied, the appellant appealed.

Held (dismissing the appeal):

[1] The existence of Ah Lee was proffered by the defence and the police had assisted in investigating his whereabouts but to no avail. In any case, if the said Ah Lee could be traced later, s. 173(c) of the CPC allows for further evidence to be tendered at a future date during the continuation of the hearing of the trial. Hence, there is no abuse of the process of the court as alleged. (p 142 a-c)

[2] In the light of s. 173(c) of the CPC and art. 145 of the Federal Constitution and the fact that the prosecution was ready to proceed with

the hearing, the court cannot interfere with the discretion of the prosecuting officer who is acting on behalf of the Attorney General/Public Prosecutor. The court will not interfere with the decision of the prosecution when they state that they are ready to proceed on the evidence available as they are having conduct of the prosecution. The court will take their statement that they are ready to proceed in good faith. (p 142 d)

Case(s) referred to:
Karpal Singh & Anor v. PP [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183 SC ***(refd)***
PP v. Tan Kim San [1980] 2 MLJ 98 ***(dist)***

Legislation referred to:
Criminal Procedure Code, s. 173(c), (g)
Federal Constitution, art. 145(3)
Penal Code, s. 379A

For the appellant - Voon Lee Shan; M/s Voon & Co
For the respondent - Awang Armadajaya DPP

Reported by WA Sharif

JUDGMENT

Lau Bee Lan JC:
The appellant, Chong Fook Fatt has appealed against the order made by the learned magistrate made on 21 April 2003 dismissing the appellant's application for a discharge not amounting to an acquittal ("DNAA") for a charge under s. 379A of the Penal Code and to order further prosecution of the said charge against him.

The grounds in support of the appellant's appeal are primarily:

(1) The appellant ought to the granted a DNAA as the police investigation is incomplete.

(2) To allow the prosecution of the case against the appellant when the police investigation is incomplete would unnecessarily jeopardise the appellant's liberty.

(3) Failure of the learned magistrate to give reasons for stating that the appellant's application was premature.

(4) Failure in respect of ground (3) above has caused the appellant to be in a state of doubt as to when such an application should be made in the circumstances.

In this regard the learned deputy public prosecutor ("DPP") has aptly pointed out that the issue is essentially whether the prosecution has preferred a charge against the appellant whilst the investigations are underway. If the answer is a "Yes", then the benefit of the doubt should be given to the appellant; if the answer is "No", then the appeal should be dismissed. I cannot agree more with the learned DPP that that poser is basically the thrust of the appellant's appeal before the court.

The appellant was jointly charged with another person, Goh Ah Tang for theft of a motorcar, a Toyota Corolla KE 70 bearing registration No. KM 3667 Q, an offence under s. 379A of the Penal Code. In the magistrate's court concerned, on 21 April 2003 it was argued on behalf of the appellant that based on a letter dated 28 March 2003 from one ASP Bong Lian Min, Acting District Head of Criminal Investigation, Kuching to Voon & Co. Advocates, the solicitors for the appellant (hereinafter referred to as "the 1st letter"), the appellant was given the impression that the police were still investigating the case against the appellant and investigations were still incomplete. The material part of the 1st letter reads:

> Adalah dimaklumkan pihak polis telah mengambil tindakan yang sewajarnya. Tindakan untuk mengesan AH LEE telahpun dilakukan tetapi hingga kini masih gagal. Rumah yang dikatakan milik AH LEE sebenarnya milik orang lain. Identiti AH LEE tidak jelas dan menyukarkan penyiasatan. Sungguhpun begitu, usaha akan terus dijalankan.

(hereinafter referred to as "the material paragraph").

Further, it was submitted on behalf of the appellant that following the case of *PP v. Tan Kim San* [1980] 2 MLJ 98, the court should grant the appellant a DNAA as the investigations have not been completed.

A similar submission that was made in the court below was canvassed before me. As was correctly pointed out by the learned DPP, the 1st letter has to be seen in its proper context. The 1st letter makes reference to a letter dated 11 March 2003 which is a letter addressed by Voon & Co. Advocates to the Ketua Polis Daerah, Kuching (hereinafter referred to as "the 2nd letter"). The essence of the 2nd letter is that the appellant denied the charge against him and disclosed information to the police to trace one "Ah Lee" whom the appellant alleged had requested him to respray the motorcar. The 2nd letter also alluded to the fact that ASP Bong was aware of Ah Lee's house and the appellant was willing to assist the police in the investigation. In addition, in the 2nd letter, another letter dated 11 July 2002 from Voon & Co Advocates to Sgt Johari bin Seman, Central Police Station (hereinafter referred to as "the

3rd letter") was referred. In the 3rd letter, basically it was disclosed that the appellant had led the police party headed by ASP Bong to locate Ah Lee whom the appellant alleged was the person who left the motorcar in the vicinity of his house and was believed to live in Sg Apong area. It is also stated in the 3rd letter that the appellant was told by ASP Bong not to go near to Ah Lee's house for security and operational reasons and that the former would search the house on some other occasion.

With due respect to Mr Voon, counsel for the appellant, I am of the opinion that his submission that the principle of law to be adduced from *PP v. Tan Kim San (supra)* as "... once it is found that the investigation into the case is incomplete, there is a duty on the part of the court to have the accused discharged from the charge not amounting to an acquittal, but of course, the prosecution could later on reinstate the case against him:

(i) once investigation be completed; and

(ii) that there is a *prima facie* case against him" is only partially correct.

The following quotation from *PP v. Tan Kim San (supra)* at p. 99 was relied upon by learned counsel which states:

> This is a clear case of premature prosecution. What if the investigations disclose that there is insufficient evidence to prosecute the accused or worse still, if he was innocent of the allegation after all. On these facts, the charge as it stands, is clearly groundless. In these circumstances, the learned Magistrate, ought to have exercised his powers under s. 173(g) of the Criminal Procedure Code and discharge the accused instead of granting a postponement of the case. **I would advise Magistrates to exercise their powers under s. 173(g) of the Criminal Procedure Code whenever the prosecution asks for a postponement of a case on the ground that investigations have not been completed**. (Emphasis added)

From the statement which is emboldened above, I am inclined to agree with the learned prosecuting officer's submission before the Magistrate's Court that the instant case can be distinguished from *PP v. Tan Kim San (supra)* on the ground that the legal proposition in the latter case is that a DNAA should be made if the prosecution applies for an adjournment of the hearing of the case. (see notes of proceedings at p. 4 of Appeal Record)

I believe I am fortified in holding this view because immediately preceding the material paragraph, the learned judge has this to say:

> Turning to the facts of this case, the accused is alleged to have committed criminal breach of trust over a period of four years. It took the police more than a year to investigate yet when the case came up for trial some eight months

> after the accused was first charged in court, investigations had still not been completed and the police say they need at least another six months.

Indeed, the facts in the instant case are different. I note that on 21 April 2003 ("2nd hearing date") when the application for DNAA was first made, the prosecution informed the court that it was ready and in fact the prosecution was ready as far back as 22 August 2002 ("1st hearing date"). The prosecution was not seeking for an adjournment at all. Although the hearing was ultimately postponed on the 2nd hearing date, it was done at the behest of the 2nd accused (Goh Ah Tang) who wished to engage counsel. Here the learned magistrate in the exercise of his discretion allowed the postponement when the Prosecution posed no objection although the defence counsel objected. (see p. 5 of Appeal Record)

Can the court therefore discount the fact that the prosecution said that it was ready to proceed on both hearing dates?

In *Karpal Singh & Anor v. PP* [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183 SC, (cited by the defence), the then Supreme Court held that art. 145(3) of the Federal Constitution states that the Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before Syariah Court, etc. The discretion of the Attorney General is unfettered and cannot be challenged and substituted by that of the court's. (see headnotes at p. 1458 (p. 183))

With respect to s. 173(c) of the Criminal Procedure Code ("CPC") which entails that when an accused claims trial, the court shall hear 'all such evidence' as may be produced in support of the prosecution, Abdul Hamid Omar LP (as he then was) (delivering judgment on behalf of the then Supreme Court in *Karpal Singh*'s case *(supra)* at p. 1465 (p. 191) opined:

> In our considered view, the expression 'all such evidence' is not confined to evidence which is available to the prosecution but which could not be produced for unavoidable reason at a specific date of hearing forming part of the trial. **The term 'all such evidence' is to be given a broad interpretation and should also include evidence which can be produced at the continued hearing of the trial on a future occasion**. (Emphasis added)

The material paragraph has to be viewed against the backdrop of the 2nd and 3rd letters. Viewed in that perspective it discloses that the police had conducted investigations on Ah Lee as proposed by the appellant but were unsuccessful since the house that was said to belong to Ah Lee was occupied by someone else. Further, the identity of Ah Lee was vague and that impeded investigation. Despite these odds the police stated that efforts will be continued to locate Ah Lee. (see 1st letter)

The existence of "Ah Lee" was proffered by the defence and the police has assisted in investigating his whereabouts but to no avail as at 21 April 2003. My understanding of the 1st letter is an assurance by the police that they will pursue to trace Ah Lee, but it does not mean that the prosecution was not ready to proceed as stated by them on 21 April 2003 and it must be remembered that the investigation was set in motion at the request of the defence.

However, if the said "Ah Lee" could be traced later, s. 173(c) of the CPC allows further evidence to be tendered at a future date during the continuation of the hearing of the trial. Hence, I find there is no abuse of the process of the court as alleged by the defence.

In the light of the interpretation to be accorded to s. 173(c) of the CPC and art. 145(3) of the Federal Constitution and the backdrop that in the present case, the prosecution was ready to proceed with the hearing on both occasions, can the court interfere with the discretion of the prosecuting officer who is acting on behalf of the attorney general, the public prosecutor. By no means! It is not the business of the court to interfere with the decision of the prosecution when they state that they are ready to proceed on the evidence available as they are having conduct of the prosecution. The court will take the statement of the prosecution that it is ready to proceed in good faith.

Therefore, I am of the view that the learned magistrate did not err as contended by Mr Voon when he said:

> Upon hearing to [sic] both parties, the court is of the view that it is premature for court to decide at this stage that the charge against the accused [sic] groundless and whether or not to discharge the accused under Section 173(g) on the grounds that the charge is groundless.
>
> In this case, **the prosecution is ready to proceed, and the prosecution should be allowed to proceed with their case**. Application for discharge not amounting to an acquittal is dismissed. (Emphasis added)

In my considered opinion, the key words to be noted in the learned magistrate's order are:

(1) it is premature for the court to decide;

(2) the prosecution is ready to proceed; and

(3) the prosecution should be allowed to proceed with their case.

I surmise the learned magistrate made such an order because in the three situations above, firstly, there was evidence available; secondly, the prosecution were ready and was not seeking an adjournment; and thirdly, it is the discretion of the prosecution to decide whether to proceed or otherwise. It is not for the court to trespass into the prosecution's turf.

In conclusion, for all the aforesaid reasons, I find there is no merit in the arguments of the defence. Under the circumstances the order of the learned magistrate is affirmed. The appeal of the appellant is accordingly dismissed.